MOTION FILED
JUN 16 1986

No. 85-1894

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

EVELYN FALKOWSKI,
Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION AND BRIEF ON BEHALF OF AMICUS CURIAE THE CHRISTIC INSTITUTE

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EVELYN FALKOWSKI,

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RESPONDENT

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FOR THE D. C. CIRCUIT

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE

The Christic Institute respectfully moves this Court, pursuant to Rules 36.1 and 42.3 of its Rules of Practice, for leave to file the attached brief as amicus curiae in support of Petitioner's petition to seek review of an important question concerning the check

and balance of the three branches of the United States government.

Specifically involved is the right of a government employee to utilize machinery enacted by Congress, including litigating against his or her employing agency, without for that express reason being denied terms and conditions of employment customarily provided to employees otherwise similarly situated.

This motion and the attached brief are timely filed within the time allowed for filing of respondent's brief on the petition for certiorari.

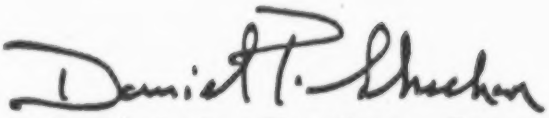
Amicus curiae is an organization which seeks to protect human rights and attain a more just world, and which has been involved in issues of human rights, civil rights, and constitutional government.

The proposed brief of amicus addresses the need for granting the writ from a broad perspective. It discusses the general importance to the public interest of this case which mis-applies this Court's decision in Heckler v. Chaney, 470 U. S.___, 105 S.Ct. 1649 (1985), after remand for reconsideration in the light of that decision.

Amicus believes that just as Courts must follow principled discretion, for instance in arriving at awards of attorney fees, as discussed in Moody v. Albemarle, 422 U. S. 405 (1975), the discretion of executive agencies similarly must be structured.

Amicus has requested the consent of the parties to appear. Petitioner has granted such request. Respondent has not granted the request as of this date. Amicus respectfully moves the Court for leave to file the brief amicus curiae attached

in support of granting the writ of certiorari.



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BRIEF ON BEHALF OF AMICUS CURIAE THE CHRISTIC INSTITUTE

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June 14, 1986

STATEMENT OF INTEREST OF AMICUS CURIAE

The Christic Institute

The Christic Institute is a non-profit organization. An ecumenical center for public policy and public-interest law, it is best known for its vigorous investigations and court challenges of corporate and government violations of human rights. It chooses for support cases with potential to advance personal freedom and social justice in the United States. Among many legal projects, the Institute waged a successful fight to force the Kerr-McGee Nuclear Corporation to accept responsibility for Karen Silkwood's massive exposure to plutonium after she reported health and safety violations to the government. It represented the families of demonstrators murdered by members of the Ku Klux Klan and American Nazi Party in Greensboro, North Carolina.

In the case at bar, its interests include

exactly that when they represented Petitioner's higher ranking co-defendants sued in the same capacities as she, without representing her.

Amicus holds that a precedent which holds discretion not even limited by a record showing of an unlawful factor, seriously threatens individual rights.

FACTS

When Petitioner was sued by a former Deputy, the Justice Department denied access to government counsel on three grounds written and quoted in Falkowski v. EEOC, 719 F. 2d. 470 at 480-483.

Petitioner also was said to be litigation-prone.

The record underlying thic case suggests more than a possible deprivation of individual rights. Rights may have been denied because of attempts to prevent mistaken or wrongful governmental action.

ARGUMENT

I. THIS CASE PRESENTS THE QUESTION WHETHER NON-FRIVOLOUS EXCERCISE OF THE RIGHT TO PETITION FOR REDRESS CAN BE PENALIZED "IN THE INTEREST OF THE GOVERNMENT".

Justice's written reasons are quoted in Falkowski v. EEOC, 719 F. 2d. at 481, 482 for denying access to government-supplied counsel for a federal manager sued for alleged official acts.

The third reason written to Petitioner by the Department of Justice for denying her access to counsel was the fact that she had sued the government in a separate action. This reason, was prior to the remand, termed the "least satisfactory of all," Falkowski v. EEOC, 719 F. 2d at 482, by the D. C. Circuit Court of Appeals, which afterward denied en banc review.

Heckler v. Chaney, 470 U. S. ____; 105 S.Ct. 1649 (1985) and Jean v. Nelson, 472 U. S. ____; 105 S.Ct. 2992 (1985) actually support review of governmental action for

impermissible considerations. While the former decision calls for review of colorable constitutional claims, the latter decision, also authored by Justice Rehnquist, finds review called for because there are inferable statutory violations.

Amicus urges that Sherbert v. Verner, 374 U. S. 398 (1963), counsels that neither a privilege nor a right may be infringed for excercise of legal right.

Cases such as Thigpen v. Roberts, 468 U. S. 27 (1984), which protect from vindictive prosecution, should govern this case. As noted by the Court below in its earlier decision, because of Petitioner's appeal, findings adverse to EEOC, including her, in a case mooted without trial, were vacated to spawn no consequences. Falkowski v. EEOC, 719 F. 2d at 473.

As an amicus brief below, Brief of the American Civil Liberties Union Fund of the National Capital Area, Amicus Curiae, in

Support of Petition for Rehearing En Banc, pointed out at p. 3, "the one time an employee's request for counsel is rejected . . . so far as the record shows, the denial. . . was for irrational or vindictive reasons. See Falkowski v. EEOC, 719 F.2d. at 480-483."

II. UNLESS THIS COURT REVERSES A MISAPPLICATION OF HECKLER V. CHANEY AFTER REMAND BOTH INDIVIDUAL AND SOCIETAL INTERESTS WILL BE LESS PROTECTED.

If the fact of challenge, successful or otherwise, can be grounds for adverse decision regarding a privilege, or for the deprivation of liberty and property, then the right to petition for attaining the public good may be endangered.

Fraud and waste, unchecked by defense agencies, was curbed because of litigation by a government employee. Harlow v. Fitzgerald, 457 U. S. 800 (1982). See "The Whistle Blower Provisions of the Civil Service Reform Act of 1978," West's Fed-

eral Practice Manual §11295.

Problems in the nuclear industry have been uncovered by workers having the courage to initiate action against their employers. Cf. Silkwood v. Kerr McGee, 464 U. S. 239 (1984).

And abuses of power by the executive have been called to account. U. S. v. Nixon, 418 U. S. 683 (1974).

Some challenges to governmental actions will be wrong. Let them fail on their merits -- but vindictiveness against the right to challenge is beneath the dignity and the principles of a government of laws.

CONCLUSION

The decision below should be reversed.

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